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STEVEN SCHMITZ, ET AL. CA 15 103525

vs.

Judge:

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
ET AL.

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IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO

Steven Schmitz, et al., **Appellants,** **v.** **National Collegiate Athletic Association, et al.,** **Appellees.**	**Case No. CA-15-103525** On appeal from the Court of Common Pleas Cuyahoga County, Ohio

DEFENDANT-APPELLEE UNIVERSITY OF NOTRE DAME DU LAC'S MERIT BRIEF

Oral Argument Requested

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I. APPELLANTS' ASSIGNMENT OF ERROR

Plaintiffs-Appellants assigned the following error to the trial court's decision:

> "The trial court erred by granting the Motions to Dismiss, because the complaints' allegations are sufficient to state each claim, and the Complaint does not conclusively show on its face that Plaintiff-Appellants' claims are barred by any statute of limitations. (Decision and Entry, September 1, 2015)"

II. ISSUE PRESENTED

Appellants'[1] assignment of error rests on a single issue: whether the trial court properly dismissed as time-barred Appellants' claims for personal injuries suffered by Schmitz while playing football a generation ago at Defendant-Appellee University Notre Dame du Lac ("Notre Dame"), where the Amended Complaint ("Complaint") conclusively showed Schmitz was aware of his concussive brain injuries at the time they occurred between 1974 and 1978. The answer is yes, and the trial court's dismissal of Appellants' claims should be affirmed.

The face of Appellants' Complaint conclusively showed that Schmitz's alleged injuries are not latent injuries under Ohio law—that is, they are not "new" injuries that only emerged in the first instance at a time subsequent to defendants' alleged wrongful conduct. Rather the injuries at issue here, specifically Schmitz's alleged chronic traumatic encephalopathy ("CTE") and other neurocognitive diseases, are the worsening and deterioration of head injuries Schmitz suffered almost forty years ago, that he ***knew*** he suffered then, and that he ***knew*** were related to conduct on the football field. Thus, contrary to Appellants' contention, this ***is not a latent injury case*** where the discovery rule might apply, rather ***it is an extent of injury case*** where the discovery rule does not apply.

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[1] "Appellants" collectively refers to Plaintiff-Appellant Steven Schmitz, through his estate, ("Schmitz"), and his wife, Plaintiff-Appellant Yvette Schmitz.

Ohio law is clear. Schmitz was not entitled to discovery tolling because he pled he suffered immediate injuries—concussions and other perceptible head injuries—when he played football at Notre Dame nearly forty years ago and merely seeks to recover for the full extent of those injuries. Ohio courts have repeatedly refused to toll claims until a plaintiff knows the full extent of his injury, and this is particularly true with respect to claimed cognitive damage due to prior head blows. *Pingue v. Pingue*, 5th Dist. Delaware No. 03-CA-E-12070, 2004-Ohio-4173, ¶ 14, *appeal not accepted*, 104 Ohio St.3d 1440, 819 N.E.2d 1123 (2004). Were it otherwise, no claim would ever accrue, and any plaintiff could sit on his hands for a generation of deteriorating injury, while—like here—evidence dissipates, memories fade, and witnesses long pass away. *Id.*

Further, even if the discovery rule did apply (and it does not), Appellants did not plead that they acted with reasonable diligence in pursuing their claims, as required under *O'Stricker v. Jim Walter Corp.*, 4 Ohio St. 3d 84, 90 (1983). Rather, they merely asserted that Notre Dame possessed "superior knowledge" of public information showing that concussive brain injuries could deteriorate with time. The discovery rule's diligence requirement is concerned with Appellants' conduct in discovering their claims, not with Notre Dame's knowledge of publicly available information. Because Appellants pled that voluminous information about the link between repetitive concussive head blows in football and Schmitz's alleged injuries was widely available for decades prior to bringing this action, Appellants are bound by that same public knowledge.

Even if Schmitz's personal injury claims were not time-barred, his breach of express contract claim (Count VI)—to the extent it is severable from the personal injury claims—is barred under Ohio Revised Code § 2305.06, which required him to file this action within fifteen years of the alleged breach. Contract claims are not subject to discovery rule tolling. Therefore,

because any alleged contractual relationship ended in 1978 when Schmitz ceased playing football for Notre Dame, the statute of limitations for his contract claim expired under any circumstance in 1993—more than twenty years ago.

Statutes of limitations exist to "ensure fairness to defendants," "encourage prompt prosecutions of causes of action," "suppress stale claims," and avoid "difficulties of proof in older cases." *O'Stricker*, 4 Ohio St. 3d at 88. For each of these reasons, Appellants cannot sue Notre Dame for events that took place in a different time and age on a football field some forty years ago.

In short, the trial court's decision to grant Notre Dame's motion to dismiss was firmly grounded in well settled Ohio law, and should be affirmed.

III. STATEMENT OF THE CASE

Pursuant to Ohio R. App. P. 16(B), while Notre Dame is generally satisfied with Appellants' recitation of the case's procedural posture it notes disagreement with or clarifies the following:

- Notre Dame cannot confirm the accuracy of Appellants' statements about when Appellant Schmitz was first diagnosed with CTE. Appellants' Brief ("App. Br.") at 1.
- Notre Dame acknowledges that on February 20, 2015 Appellants filed a Notice of Suggestion of Death attaching two certificates of death, the first listed the "Immediate Cause" of death as "Alzheimer's dementia" and noted that the "Approximate Interval Between Onset and Death" was "years." It also listed "coronary artery disease, cerebrovascular disease" as "contributing to death." Only the later "amended" certificate indicated

CTE as the "Immediate Cause," but again listed the "Approximate Interval Between Onset and Death" as "years." That certificate additionally shows that Appellants not only declined conducting an autopsy which would permit an actual diagnosis of CTE, but further decided to have Schmitz cremated. App. Br. at 2; Notice of Suggestion of Death, Ex. 1 (Feb. 20, 2015).

- Notre Dame disagrees with Appellants' characterization of the decision in *In re NHL Hockey League Players' Concussion Injury Litigation*, MDL No. 14-2551, 2015 U.S. Dist. LEXIS 38755 (D. Minn. March 25, 2015) as "analogous" to the case at bar. App. Br. at 3.

IV. STATEMENT OF FACTS

Appellants, residents of Cleveland, Ohio, filed this action on October 20, 2014 against Notre Dame, a non-profit institution of higher-education in Notre Dame, Indiana, and co-defendant the National Collegiate Athletic Association ("NCAA"), an unincorporated association with its principal offices in Indianapolis, Indiana. (Compl. at ¶¶ 12, 13, 23, 26.) Schmitz alleged that, as a result of the "repetitive concussive blows and/or sub-concussive blows to the head [Schmitz] suffered while playing running back and receiver on the Notre Dame college football team," Schmitz suffered from the "debilitating effects of mild traumatic brain injuries" including "severe memory loss, cognitive decline, Alzheimer's, traumatic encephalopathy, and dementia." (Compl. at ¶¶ 3, 19.)

Specifically, Schmitz alleged that he was recruited to play football at Notre Dame. (Compl. at ¶ 16.) He signed a letter of intent in the Spring of 1974 accepting a scholarship to attend Notre Dame, and agreeing to play for its football team. (Compl. at ¶ 16.) According to the Complaint, Schmitz's scholarship was contingent on his continued participation in the

football program. (Compl. at ¶¶ 17, 63.) Schmitz played football at Notre Dame from 1974 to 1978. (Compl. at ¶ 1.)

The Complaint alleged that "[b]oth before and after Steve Schmitz played football at Notre Dame . . . Notre Dame knew or should have known of the mounting literature and medical advice regarding the latent effects of concussive or sub-concussive-impacts and the need for disclosure to Notre Dame football players, pre-season baseline neuro-psychological testing, and safe return to play guidelines." (Compl. at ¶ 69.) The Complaint cited numerous studies, guidance documents, and concussion protocols, including several published between 1982 and 2007, after Schmitz left Notre Dame, that Schmitz claimed drew a link between participation in sports like football, Mild Traumatic Brain Injury ("MTBI"), and long term-cognitive disability and decline. (Compl. ¶¶ 69-101.) Schmitz claimed that in April 2010, the NCAA, of which Notre Dame is a member institution, "made changes to its concussion treatment protocols" that included requirements that any student-athlete who exhibited signs or symptoms of a concussion should "be removed from practice or competition" and evaluated by medical staff. (Compl. at ¶¶ 109-110.)

While playing football at Notre Dame between 1974 and 1978, Schmitz alleged that Notre Dame players—including himself—"inflict[ed] on each other and opponents helmet to helmet hits of all kinds, including concussive and sub-concussive head injuries." (Compl. at ¶ 62.) Schmitz further alleged that he was "subjected to repetitive concussive and sub-concussive impacts" and that "[o]n many occasions in drills, practices, and games, [Schmitz] experienced concussion symptoms, including but not limited to being substantially disoriented as to time and place." (Compl. at ¶¶ 43, 64.) According to Schmitz, Notre Dame coaches "accepted, praised, and rewarded tackling and blocking techniques that involved the use of the

helmeted head against opposing players and teammates" and "taught and/or encouraged . . . [players to use] their helmeted heads as a weapon and/or implement that would injure opponents and themselves." (Compl. at ¶¶ 61-62.) Schmitz alleged the use of these techniques and the injuries that he suffered "aggravated the risk" that Schmitz would develop "neurodegenerative disorders and diseases, including but not limited to CTE [chronic traumatic encephalopathy], Alzheimer's disease, and other similar cognitive-impairing conditions." (Compl. at ¶¶ 62, 127.) Further, Schmitz alleged that his injuries were ignored by coaches, and left untreated. (Compl. at ¶¶ 63, 65, 66.) He claimed that, in fact, Notre Dame coaches "ordered and expected" injured players to "continue to participate in the practice or game," and any player who did not continue to participate "risked his place on the Notre Dame football team" and his scholarship. (Compl. at ¶ 63.)

Based on these and other facts alleged in the Complaint, Schmitz asserted four primary causes of action against Notre Dame: (1) negligence (Count I); (2) fraudulent concealment (Count II); (3) constructive fraud (Count III), and (4) breach of express contract (Count VI). In addition, Appellant Yvette Schmitz asserted a derivative claim for loss of consortium (Count VII).[2] The trial court granted Notre Dame's motion to dismiss all of Appellants' claims against it with prejudice.

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[2] The remaining claims, Counts IV and V, are against the NCAA alone. Appellants inaccurately assert in footnote 7 of their brief that Notre Dame "did not challenge the constructive fraud claim [Count III] in the lower court." This is plainly wrong. Notre Dame sought dismissal of each and every count against it on the basis that all Appellants' claims were time-barred—including their constructive fraud claim (Count III). *See* Notre Dame's Motion to Dismiss Amended Complaint at 4-5 (reciting Appellants' causes of action against Notre Dame including "(3) **constructive fraud (Count III)**") (emphasis added); *id* at 22 (stating "Therefore, Schmitz's claims under **Counts** I, II, **III** and VI of the Complaint were filed more than two years after they accrued, and thus they are barred under Ohio Revised Code § 2305.10(A).") (emphasis added); *id.* at 24 ("Notre Dame respectfully moves this Court for an Order dismissing all of

V. STANDARD OF REVIEW

The grant of Notre Dame's Motion to Dismiss is subject to de novo review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶ 5 ("An order granting a Civ.R. 12(B)(6) motion to dismiss is subject to de novo review.").

Under Rule 12(B)(6), a complaint must be dismissed when the plaintiff can prove no set of facts warranting relief. *State ex rel. Jennings v. Nurre*, 72 Ohio St. 3d 596, 597, 651 N.E.2d 1006 (1995). Factual allegations of the complaint are presumed to be true, and all reasonable inferences must be made in favor of the nonmoving party; however, unsupported legal conclusions are not presumed to be true and are not sufficient to withstand a motion to dismiss. *Id.*; *State ex rel. Hickman v. Capots*, 45 Ohio St. 3d 324, 544 N.E.2d 639 (1989). Further, "[a] motion to dismiss based upon a statute of limitations may be granted when the complaint shows conclusively on its face that the action is time-barred." *Doe v. Archdiocese of Cincinnati*, 109 Ohio St. 3d 491, 493, 849 N.E.2d 268 (2006).

VI. ARGUMENT

A. Dismissal Was Proper Because Claims Against Notre Dame Are Barred By Ohio's Two-Year Statute Of Limitations For Personal Injury Claims.

All four of Schmitz's primary claims against Notre Dame: negligence (Count I), fraudulent concealment (Count II), constructive fraud (Count III), and breach of express contract (Count VI) are time-barred under Ohio's two-year statute of limitations for personal injury claims. O.R.C. § 2305.10(A). Further, because the primary claims are time-barred, Appellant Yvette Schmitz's derivative claim for loss of consortium (Count VII) also fails.

(continued…)

Plaintiffs' claims against it—**Counts** I, II, **III**, VI and VII of the Complaint—with prejudice.") (emphasis added).

1. Ohio Revised Code § 2305.10(A)'s Two-Year Limitations Period Applied To Counts I, II, III and VI Because They Seek To Recover For Schmitz's Alleged Bodily Injuries.

Ohio has a two-year statute of limitations for personal injury claims.[3] O.R.C. § 2305.10(A). It applies in any case where the essence of the action is to recover for bodily injuries, no matter how the claims are labeled in the pleading. *See Andrianos v. Community Traction Co.*, 155 Ohio St. 47, 97 N.E.2d 549 (1951), syllabus ("[T]he form in which the action is brought is immaterial."). In *Andrianos*, the Supreme Court made clear that "whether the action is strictly in tort or for breach of contract, it is nonetheless an action to recover damages for bodily injury and is governed by the two-year limitation." *Id.* at 51; *see also Nadra v. Mbah*, 119 Ohio St. 3d 305, 2008-Ohio-3918, 893 N.E. 2d 829, ¶ 27 (following *Andrianos* and applying the two-year personal injury statute of limitations to claims pled under 42 U.S.C. § 1983); *Breno v. City of Mentor*, 8th Dist. Cuyahoga No. 81861, 2003-Ohio-4051, ¶¶ 10-12 ("This court has previously held that in determining which statute of limitations should be applied to a particular cause of action courts must look to the actual nature or subject matter of the case rather than the form in which the action is pleaded." (internal quotation omitted)).

Here, all of Schmitz's claims seek recovery for personal injuries he allegedly suffered. (*See e.g.*, Compl. at ¶ 11 (stating "as a direct result of Defendants' tortious actions,

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[3] Appellants do not contest that Ohio's statute of limitations and procedural rules apply to this case. In fact, Appellants urge that Ohio's substantive law should apply to the claims here as well. App. Br. at 23. In their brief, Appellants incorrectly state that Notre Dame does not dispute that Ohio's substantive law applies to their claims. *Id.* at n.4. This is not accurate. In its Motion to Dismiss, Notre Dame expressly noted that while the trial court was not required to analyze the substantive choice of law issues in order to resolve Notre Dame's motion, which was based on procedural grounds in the form of the statute of limitations, Notre Dame believed that Indiana law would likely apply to the substance of Appellants' claims. Notre Dame's Motion to Dismiss at 5 n.3; *see also Morgan v. Biro Mfg. Co.*, 15 Ohio St. 3d 339, 342-343, 474 N.E.2d 286 (1984).

Appellant Steve Schmitz suffers from . . . neurological and cognitive damage that have resulted in full disability at age 58"); Compl. at ¶ 151 (stating "[a]s a direct and proximate result of . . . Notre Dame's concealment and/or withholding of facts and information, Appellant Steve Schmitz has suffered and will continue to suffer substantial injuries"); Compl. at ¶ 181 (stating "Notre Dame's breach of its contractual obligation caused Appellant Steve Schmitz to suffer physical injury"); Compl. at ¶ 140 (stating "[a]s a direct and proximate result of . . . Notre Dame's knowing concealment and/or willful blindness, Appellant Steve Schmitz has suffered and will continue to suffer substantial injuries, emotional distress, pain and suffering").)

Appellants argue that their fraud claims are entitled to the four-year limitation period under Ohio Revised Code § 2305.09. App. Br. at 21-22. But, like all Appellants' other claims, their claims sounding in fraud are in fact claims for personal injuries subject to the two-year limitations period under Ohio Revised Code § 2305.10. *See Viock v. Stowe-Woodward Co.*, 13 Ohio App. 3d 7, 11, 467 N.E.2d 1378 (Ohio Ct. App., Erie County 1983) (Claim alleging fraudulent concealment of dangerous working conditions was essentially a claim alleging personal injury and thus the two-year statute of limitations applied); *Gilliam v. Mid-American Sec. Serv.*, 1994 Ohio App. LEXIS 5901, *4-5 (Ohio Ct. App., Trumbull County Dec. 23, 1994) (Plaintiff's common law fraud claim was in essence "an attempt to recover for bodily injuries sustained while working for appellee. As such, appellant is precluded from extending the statute of limitations by labeling it as a fraud claim. To hold otherwise would defeat the statute of limitations for bodily injury."); (Compl. at ¶¶ 140, 151.).

Therefore, it was proper to apply the two-year statute of limitations to Counts I, II, III and VI of Appellants' Complaint.

2. The Statute Of Limitations On Appellants' Claims Expired Almost Forty Years Ago.

Under Ohio law, the general rule is that a cause of action accrues when the wrongful act is committed. *O'Stricker*, 4 Ohio St. 3d at 87. "The cause of action ordinarily accrues, and the limitations period begins to run, when the event giving rise to liability occurs." *Flynn v. Bd. of Trustees of Green Town.*, 1st Dist. Hamilton No. C-060178, 2006-Ohio-6622, ¶ 5, *appeal not accepted*, 113 Ohio St.3d 1512, 866 N.E.2d 511 (2007). Here, Schmitz alleges that between 1974 and 1978, (1) Notre Dame players—including Schmitz—"inflict[ed] on each other and opponents helmet to helmet hits of all kinds, including concussive and sub-concussive head injuries" (Compl. at ¶ 62); (2) Schmitz "was subjected to repetitive concussive and sub-concussive impacts in practices and games" (Compl. at ¶ 43); (3) during "drills, practices, and games, [Schmitz] experienced concussion symptoms, including but not limited to being substantially disoriented" (Compl. at ¶ 64); (4) his coaches encouraged hits that put him at risk of these head injuries (Compl. at ¶¶ 61-63); and (5) he was not treated for these head injuries (Compl. at ¶¶ 62, 63, 65-67). Schmitz thus was required to file suit within two years of that time.

Appellants' claims cannot be saved by the "discovery rule." First, the "discovery rule" ***does not apply*** to toll claims when a claimant concedes that injury was immediately apparent. Second, the discovery rule does not permit a plaintiff to wait until he believes he has suffered "the full extent" of his injury to bring his claim. Third, the policies underlying the statute of limitations were served and furthered by strict application of the statute in this case. And finally, even if the discovery rule applied, Schmitz's own allegations show that he was on notice of his claims more than two years before filing this action.

Therefore, Appellants' claims were time-barred, and dismissal of their action was proper.

(a) The discovery rule does not apply because Schmitz was immediately aware that he was injured no later than 1978.

A personal injury cause of action accrues immediately when a plaintiff knows that he has suffered some type of injury. *See Braxton v. Peerless Premier Appliance Co.*, 8th Dist. Cuyahoga No. 81855, 2003-Ohio-2872, ¶¶ 20-22 (plaintiff's claim accrued when he was initially injured by an explosion in his oven); *Flynn*, 2006-Ohio-6622 at ¶ 10 (claim accrued when plaintiff slipped, fell, and was injured); *Baxley v. Harley-Davidson*, 172 Ohio App. 3d 517, 2007-Ohio-3678, 875 N.E.2d 989, ¶ 9 (1st Dist.) (negligence and warranty claims accrued at time of motorcycle accident). The discovery rule, on the other hand, applies only when an injury "does not manifest itself immediately." *O'Stricker*, 4 Ohio St. 3d at 90; *Braxton*, 2003-Ohio-2872 at ¶ 14. In *Braxton*, the Eighth District Court of Appeals refused to apply the discovery rule to toll the two-year statute where a plaintiff knew he had been injured but had not yet appreciated the issues of "linking" or causation. 2003-Ohio-2872 at ¶ 15. The Court held "[t]he discovery rule is therefore inapplicable here and [plaintiff's] cause of action began to accrue immediately . . . . Here, [plaintiff] was on notice that he had been injured and that the defendants may have been liable." *Id.* at ¶ 14; *see also Flynn*, 2006-Ohio-6622 at ¶ 7 ("[Plaintiff] knew she was injured. The discovery rule was therefore not applicable."); *Baxley*, 2007-Ohio-3678 at ¶ 9 (declining to apply discovery rule tolling because plaintiff "knew immediately that he had been hurt").

Here, contrary to Appellants' argument in their brief,[4] Schmitz unmistakably ***pled*** that he suffered and felt the effects of his head injuries while he played football at Notre Dame

[4] *Compare* App. Br. at 4 (asserting "[w]hen Steven Schmitz was a player, neither he nor the football leadership of Notre Dame ever recognized that he sustained a head injury of any kind") *with* Compl. at ¶ 64 (stating "[o]n many occasions in drills, practices, and games,

between 1974 and 1978. (Compl. at ¶ 43 (stating that "Schmitz was ***subjected to repetitive concussive and sub-concussive impacts*** in practices and games") (emphasis added); Compl. at ¶ 62 (alleging "during Notre Dame football games and practices" players, including Schmitz, "use[d] their helmeted heads . . . to inflict on each other . . . helmet to helmet hits of all kinds, including ***concussive and sub-concussive head injuries*** . . . .") (emphasis added); Compl. at ¶ 64 (stating "[o]n many occasions in drills, practices, and games, [Schmitz] ***experienced concussion symptoms***, including but not limited to being substantially disoriented as to time and place.") (emphasis added).) Therefore, Schmitz cannot avail himself of the discovery rule and his claims accrued at the time he alleged he suffered his head injuries—which would be, under the facts averred in the Complaint, no later than 1978.

(b) The discovery rule does not apply where injuries occur but are not known to their "full extent."

At bottom, Appellants argue that the forty-year delay in bringing this action is justified because the cognitive impairment Schmitz allegedly suffered from his head injuries deteriorated over time to the point that he was "not employable [and] ha[d] been diagnosed with severe memory loss, cognitive decline, Alzheimer's, traumatic encephalopathy, and dementia . . . ." (Compl. at ¶ 19.) The discovery rule, however, does not apply to toll the statute of limitations merely because a plaintiff lacks knowledge about the full extent of his injuries, so long as the plaintiff is aware that he was injured in some fashion. *Pingue*, 2004-Ohio-4173, ¶ 14. A "new diagnosis" based on an old injury does not create a "new cause of action."

(continued…)

[Schmitz] experienced concussion symptoms, including but not limited to being substantially disoriented as to time and place").

In *Pingue*, Plaintiff brought an action in March of 2003 asserting tort claims against his father based on physical abuse he suffered from 1962 until 1990. *Id.* at ¶¶ 10-11. In March of 2002, a neurologist diagnosed plaintiff with "irreversible brain injury" caused by the repeated physical trauma to his head from the years of abuse, and informed him that he faced an increased risk of suffering from Parkinson's disease and Alzheimer's disease. *Id.* at ¶ 10. Appellant claimed that, under *O'Stricker*, his claims were tolled until he learned the extent of his injuries—i.e., when the neurologist diagnosed his brain deterioration and increased risk of long-term, degenerative neurocognitive diseases. *Id.* at ¶ 22. The Court of Common Pleas ***dismissed plaintiff's claims on the pleadings***, holding that they were time-barred. *Id.* at ¶ 12. On appeal, the Fifth District Court of Appeals ***affirmed***, holding that if "we were to adopt a discovery of the extent of injuries standard [advanced by plaintiff], how would the injured party know when his injury has progressed sufficiently to trigger the running of the statute of limitations?" *Id.* at ¶ 22. Importantly, the Court noted:

> The court here found appellant knew he had been injured, and knew the identity of the person who injured him at least since 1990. The court found although [plaintiff] may not have understood the true extent of his injuries until March 2002, this was not sufficient to toll the statute of limitations.

Id. at ¶ 14; *see also Grooms v. Grooms*, 10th Dist. Franklin No. 84AP-773, 1985 Ohio App. LEXIS 5754, *4-5 (Feb. 26, 1985) ("No new cause of action for assault and battery accrued when plaintiff later discovered that the extent of her bodily injuries were greater than she originally realized."); *Doe v. First United Methodist Church*, 68 Ohio St. 3d 531, 538-39, 629 N.E.2d 402 (1994) (stating "[a]lthough appellant may not have discovered the full extent of his psychological injuries until September 1989, the fact that appellant was aware upon reaching the age of majority that he had been sexually abused by [appellee] was sufficient to trigger the commencement" of the statute of limitations); *Jones v. Hughey*, 153 Ohio App. 3d 314, 2003-

Ohio-3184, 794 N.E.2d 79, ¶ 27 (10th Dist.) (citation omitted) ("An accrual of a cause of action is not delayed until the full extent of the resulting damage is known."); *Mankes v. North Ridgeville City Schs.*, 9th Dist. Lorain No. 98-CA-007177, 2000 Ohio App. LEXIS 1959, *10 (May 10, 2000) (stating that if the discovery rule applied it only tolls the statute of limitations "until the plaintiff discovers, or should have discovered, his injury and the identity of the responsible party, regardless of whether he is aware of the full extent of his injury"); *Clay v. Kuhl*, 189 Ill. 2d 603, 613, 727 N.E.2d 217 (Ill. 2000) ("[A] plaintiff's failure to learn the full extent of the injuries caused by defendant's acts will not toll the statute of limitations."); *Golla v. General Motors Corp.*, 167 Ill. 2d 353, 369-372, 657 N.E.2d 894 (Ill. 1995) (affirming dismissal of a claim where plaintiff was injured in an automobile accident and obtained medical treatment that day but was not diagnosed with reflex sympathetic dystrophy until after the statute of limitations had run); *Howard v. Fiesta State Show Park, Inc.*, 980 S.W.2d 716, 722 (Tex. App. 1998) ("The fact that [plaintiff's] injury might have been slight at that time, or different from the ultimate injury for which he now sues, is immaterial" to the accrual of the cause of action.).

Similarly, in *Howard*, a court applying analogous principles of law held that "a cause of action accrues at the time of the injurious event, regardless of when the injured party learns the full extent of injury." 980 S.W.2d 716, 721 (Tex App. 1998). There, plaintiff suffered a spinal injury while riding on a roller coaster. *Id.* at 718. He instantly perceived pain in his neck and shoulder, but was unaware that more significant damage was caused to his cervical spine. *Id.* More than three years after riding the roller coaster, he experienced new symptoms, and was diagnosed with a previously undetected spinal cord injury. *Id.* Nonetheless, the court held that his claim accrued at the time of his "injury"—when he first perceived pain in his back during the roller coaster ride—not when he understood the full extent of his injury. *Id.*

at 721-22. The court in *Howard* contrasted the facts presented with those that are found in true latent injury cases, noting: "[t]he discovery rule applies to cases in which an injured party was exposed to a latent disease and remained asymptomatic for an extended period of time beyond the expiration of the statute of limitations." *Id.* at 721. Further the court noted that "[t]he fact that [plaintiff's] injury might have been slight at the time [it occurred], or different from the ultimate injury for which he now sues, is immaterial." *Id.* at 722. S*ee also Grooms*, 1985 Ohio App. LEXIS 5754, at *5 (stating "[n]o new cause of action . . . accrued when plaintiff later discovered that the extent of her injuries was greater than she originally realized").

The same considerations at play in *Pingue* and *Howard*, as well as the other cited authorities, apply here. Schmitz pled that he sustained *and* felt the effects of his head injuries while playing football at Notre Dame between 1974 and 1978. (Compl. at ¶¶ 43, 62, 64.) Schmitz did not plead a latent injury. Instead, he pled that he experienced and perceived an immediate injury and adverse effects while a football player at Notre Dame. Specifically, he pled that, during football games and practices, he received injurious blows to his head due to allegedly improper tackling techniques taught by Notre Dame's coaches, and that when those blows to his head occurred he felt apparent, adverse physiological effects that were consistent with concussions, as he himself defines them in his pleading. (Compl. at ¶ 43 (stating "Schmitz was ***subjected to repetitive concussive and sub-concussive impacts in practices and games***") (emphasis added); Compl. at ¶ 64 (stating "[o]n many occasions in drills, practices, and games, [Schmitz] ***experienced concussion symptoms, including but not limited to being substantially disoriented as to time and place***") (emphasis added); Compl. at ¶ 37 (stating "[t]he American Association of Neurological Surgeons has a ***defined a concussion*** as a 'clinical syndrome characterized by an ***immediate*** and transient ***alteration in brain function***, including an ***alteration***

of mental status and level of consciousness, ***resulting from mechanical force or trauma***'") (emphasis added).)

Further, Schmitz alleged that the purportedly latent progressive effects of his head injuries were a result of the original head injuries he suffered while allegedly being "encouraged" to make impact with his helmet. (*See* Compl. at ¶ 19.) Like the plaintiff in *Pingue*[5] and related cases, Schmitz claimed that the medical conditions allegedly uncovered by recent diagnoses were the consequence of the "debilitating long-term dangers of concussions." (Compl. at ¶ 2; *see also* Compl. at ¶ 19 ("[Schmitz] has been diagnosed with severe memory loss, cognitive decline, Alzheimer's, traumatic encephalopathy, and dementia, all of which have been ***caused, aggravated, and/or magnified by the repetitive concussive blows and/or sub-concussive blows*** to the head he suffered while playing running back and receiver on the Notre Dame football team.") (emphasis added).) These new diagnoses, based as they are on injuries previously known to Schmitz, do not create a new claim.

The discovery rule intends to protect a party where there is no immediate injury, where an injury "***only manifests*** itself at a point ***subsequent*** to the alleged negligent conduct of defendant." *O'Stricker*, 4 Ohio St. 3d at 89 (emphasis added). Thus, the discovery rule serves no purpose in this case where Schmitz alleges that he (i) ***knew*** he had suffered head injuries, (ii) ***knew*** that they occurred during football practice, (iii) ***knew*** that his coaches were allegedly telling him to hit with his head, (iv) ***knew*** that those hits resulted in the injuries, and (v) ***knew*** he

[5] Appellants attempt to distinguish *Pingue*, a personal injury tort action like their own, based on the theory of liability—battery. Nothing in the *Pingue* Court's decision indicates that the result would be any different had the claim sounded in negligence, so long as the plaintiff knew of his injury and the alleged wrongdoer—which Schmitz did.

was allegedly not being treated. (*See* Compl. at ¶¶ 61-67.) Under these alleged facts, the discovery rule does not apply.[6]

(i) Appellants' reliance on latent injury cases is misplaced because the concussions and concussion-like injuries Schmitz pled he suffered at Notre Dame were immediately perceptible to him, and he was not entitled to wait to bring this action until he appreciated the extent of his injuries.

Appellants try to evade the legal significance of what they pled through misplaced reliance on latent injury case law.

Colby v. Terminix Int'l Co. involved a plaintiff's exposure to a pesticide over a five year period, and she manifested no symptoms of her underlying disease for nearly four years after her first exposure. 5th Dist. Stark No. 96-CA-0241, 1997 Ohio App. LEXIS 1043, at*4-5 (Feb. 10, 1997). Thus, the plaintiff in *Colby*, unlike Schmitz here, was not subjected to a traumatic, immediately perceptible, physical strike to her body that instantly caused adverse physiological effects such as "disorientation." Rather, the plaintiff in *Colby* was exposed to a toxin in the air that manifested its first sign of any injury only after years passed. *Compare Colby*, 1997 Ohio App. LEXIS 1043, at *4-5 (pesticide exposure began in 1987 and first symptom manifested in 1992) *with* (Compl. at ¶ 64 (pleading that "[o]n many occasions in drills,

[6] Schmitz's pleading suggests that no claim could accrue prior to December 31, 2012 when he received a specific diagnosis for CTE. (Compl. at ¶ 20.) This is not so. Even crediting Schmitz's assertion that his injuries were "latent"—and they are not under Ohio law—all of his claims accrued when he knew of *any* of his numerous alleged cognitive injuries and knew, or reasonably should have known, that *any one of them* was caused by football. As discussed, the statute does not toll the limitations period until the extent of one's injuries are known.

practices, and games, [Schmitz] ***experienced concussion symptoms, including but not limited to being substantially disoriented as to time and place***") (emphasis added).)[7]

Similarly, *Grimme v. Twin Valley Cmty. Local Sch. Dist. Bd. of Educ.* is another toxic exposure case where the plaintiff was unknowingly exposed to a toxin, an injury subsequently emerged, and still later the exposure to a toxic substance was finally discovered. 12th District, No. CA2006-08-019, 2007-Ohio-5495 (2007). In *Grimme,* plaintiff school teacher noticed an odd odor in her classroom, subsequently began to suffer various ailments, and only months later was it revealed that she had been exposed to an undetected Freon leak. *Id.* at ¶¶ 2-3. Once again, the plaintiff in *Grimme* was not struck in the head and immediately aware of an injury, but was silently exposed to an ethereal gas leak without knowledge of its existence, and only later began to suffer any adverse effects and learned of the toxic exposure. *Id.* Thus, *Grimme* is inapt here.

Likewise, in *Williams v. Boston Scientific, Corp*, plaintiff alleged injuries caused by a defective medical device where she did not perceive the effects of *any* injury until a decade after the device was implanted. N.D. Ohio No. 3:12CV1080, 2013 U.S. Dist. LEXIS 43427, *1-2 (March 27, 2013) (device implanted in 1998 and first episode of incontinence associated with the device occurred in 2008).[8] Again, the facts of *Williams* are not analogous to the facts pled in Schmitz's Complaint where he alleges that the blows to his head left him "on many occasions in drills, practices, and games . . . ***experience[ing] concussion symptoms, including but not limited***

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[7] Indeed, the true issue addressed by the *Colby* court was not if the discovery rule applied, but rather when the toll under the discovery rule ended. The court in *Colby* was not asked, as this Court is, to determine whether the plaintiff pled an immediate or latent injury, but was asked only to determine when, under the discovery rule, does a latent injury claim accrue.

[8] As in *Colby*, the issue addressed by the court in *Williams* and *Grimme* was not if the discovery rule applied, but rather when the toll under the discovery rule ended.

to being substantially disoriented as to time and place." (Compl. at ¶ 64 (emphasis added).) There is no temporal gap in Schmitz's case between the injurious conduct and the manifestation of an injury itself.

Unlike the plaintiffs in *Colby, Grimme,* and *Williams*, here Schmitz suffered an injury, knew and perceived that he suffered that injury, but failed to avail himself of legal remedies until he appreciated the full-effect of that injury. Thus, his case is squarely on all fours with *Pingue*, 2004-Ohio-4173, ¶ 14. Importantly, the *Pingue* court distinguished *Colby* on the grounds that the plaintiff in *Colby* had no knowledge of the injury at the time the wrongful conduct occurred. *See id.* at ¶¶ 21-24.

Appellants also rely on a single, unpublished, federal district court decision from Minnesota applying the laws of Minnesota, New York, and the District of Columbia, but ***not*** addressing Ohio law at all, to argue that CTE is a *per se* "latent" injury. *In re NHL Hockey League Players' Concussion Injury Litigation*, MDL No. 14-2551, 2015 U.S. Dist. LEXIS 38755. First, as noted, that decision did not in any way address or analyze the case law on extent of injury claims in this jurisdiction. *See id.* at *13-21 (not applying or analyzing Ohio law). Second, the *NHL* court relied on the fact that it could not determine from the face of the pleading when any of the named plaintiffs' were injured. *Id.* at *17-18 (stating "[t]hus when such injuries 'occurred' or 'resulted' are matters that cannot be determined from the face of the Master Complaint . . . ."). There is no such ambiguity here.

Appellants affirmatively alleged that Schmitz suffered immediate, perceptible symptoms consistent with concussions, as Schmitz himself defined them in the pleadings, when he played football at Notre Dame in the mid-1970s. (Compl. at ¶ 64 (stating "[o]n many occasions in drills, practices, and games, [Schmitz] ***experienced concussion symptoms, including but not limited to***

being substantially disoriented as to time and place.") (emphasis added); Compl. at ¶ 37 (stating "[t]he American Association of Neurological Surgeons has a ***defined a concussion*** as a 'clinical syndrome characterized by an ***immediate*** and transient ***alteration in brain function***, including an ***alteration of mental status*** and level of consciousness, ***resulting from mechanical force or trauma***'") (emphasis added).)

Thus, as set forth in *Pingue*—and the other Ohio authorities cited—Schmitz did not allege a truly latent injury, and Appellants attempts to obtain discovery tolling to permit their decades long delay in filing this action until Schmitz perceived the full extent of his injuries are properly denied as contrary to Ohio law.

(ii) *Liddell* does not apply here because Appellants concede that CTE is directly caused by and an "aggravation" of the concussive injuries Schmitz perceived during the 1970s.

Appellants next rely on *Liddell v. SCA Services of Ohio, Inc*. arguing that, like the plaintiff in that case, they are entitled to discovery tolling even if Schmitz perceived some injury while playing football at Notre Dame. 70 Ohio St. 3d 6, 1994-Ohio-328, 635 N.E. 2d 1233 (1994). *Liddell* is inapposite here. *Liddell* is not an extent of injury case, nor does it upset the well settled rule in Ohio that a plaintiff may not wait until he knows the full extent of his injuries to file suit. *See Pingue*, 2004-Ohio-4173 at ¶ 14. Rather, *Liddell* applies only in cases where a single negligent act causes ***separate and distinct*** injuries. It is not applicable here because Appellants readily concede that CTE and the numerous other neurocognitive maladies Schmitz is alleged to have suffered are not separate from but are an "aggravate[ion]" and worsening of the original head injuries Schmitz suffered and knew about when he played football at Notre Dame. App. Br. at 5; (Compl. at ¶ 19.).

In *Liddell*, an East Cleveland police officer responding to a truck fire was unknowingly exposed to toxic chlorine gas when substances in the truck, which had no external markings indicating it was carrying hazardous materials, combusted releasing the gas. 70 Ohio St. 2d at 6. The officer suffered and received treatment for immediately emergent injuries including symptoms of smoke inhalation, watery eyes, and a scratchy throat. The symptoms of these injuries quickly abated. *Id.* However, nine months later, an entirely new injury emerged in the form of frequent sinus infections. *Id.* More than six-years after the exposure to the toxic cloud, doctors removed a benign paploma from the officer's nasal cavity. *Id.* Subsequently, a biopsy revealed a cancerous growth in his nasal cavity, and the officer's physician advised him of a relationship between his exposure to the toxic gas and the cancer. *Id.* He sued for his cancer related injuries less than a year and a half later. *Id.*

Defendant in *Liddell* did not argue that the officer's cancer related injuries were time-barred because they were derivative and exacerbations of the injuries that emerged immediately after he exited the gas cloud (his irritated throat, eyes, and lungs). Rather, defendant argued plaintiff was barred from bringing his claims for the later discovered cancer because the time to bring a claim for his prior injuries—which were unrelated to plaintiff's later emerging cancer—had run. *Id.* at 8. Defendant further argued that allowing a later claim for the cancer would impermissibly split plaintiff's cause of action. *Id.* Thus, the question presented to the *Liddell* Court was: when separate and distinct injuries arise from a single negligent act, does the failure of a plaintiff to timely bring suit for one injury bar him from later bringing suit for a different and unrelated injury, which would otherwise be subject to the discovery rule laid down in *O'Stricker*. *Id.*

The *Liddell* Court found that plaintiff had not split the cause of action because he had not brought a prior action for the first injuries. *Id.* at 9-10. However, the Court noted that had plaintiff in fact brought an action to recover for the immediately emergent injuries, it would likely have barred a second, subsequent action even for an unrelated latent injury. *Id.* at 10 n.1. But, after determining that plaintiff brought no prior action that precluded his later suit, the Court merely applied the standard discovery rule under *O'Stricker* and found that his exposure to toxic chlorine gas was analogous to asbestos exposure, and the latency of his cancer prevented his claim from accruing until it was diagnosed and his physician drew a link to the gas exposure. *Id.* at 12. The Court's holding in *Liddell* did not undermine—or even address—the rule that a plaintiff is not permitted to toll the limitations period on his personal injury claim until the plaintiff knows the full extent of his injuries. Thus, *Liddell* is not applicable to the facts here.

Unlike the parties in *Liddell*, Appellants readily acknowledge the close relationship between the known injuries Schmitz suffered while playing football at Notre Dame and the injuries for which they seek recovery in this action. App. Br. at 5 (stating "[Schmitz] suffered from severe memory loss, cognitive decline, early onset Alzheimer's disease, traumatic encephalopathy, and dementia all of which ***were caused, aggravated, and/or magnified by the repetitive concussive blows to the head he suffered while playing football at Notre Dame***." App. Br. at 5 (emphasis added); (Compl. at ¶ 19 ("[Schmitz] has been diagnosed with severe memory loss, cognitive decline, early onset Alzheimer's disease, traumatic encephalopathy, and dementia all of which ***were caused, aggravated, and/or magnified by the repetitive concussive blows to the head he suffered while playing football at Notre Dame***.").) In other words, the injuries Appellants bring suit for today are directly linked causally and are the worsening of

injuries Schmitz suffered and was aware of during his time at Notre Dame. They are ***not*** separate and distinct injuries, and the rule in *Liddell* does not apply to this case.

(c) Applying the statute of limitations in this case properly serves and furthers the statute's rationales.

Strict application of the statute of limitations in this case does not create, as Appellants contend, an "absurd rule." App. Br. at 19. In fact, it serves precisely the policy of the statute itself.

This case is forty years old. Applying the statute of limitations here appropriately serves and furthers the statute's central rationales, which are to "ensure fairness to defendant[s]," "encourage prompt prosecution of causes of action," "suppress stale and fraudulent claims," and "avoid the inconvenience engendered by delay, specifically the difficulties of proof present in older cases." *O'Stricker*, 4 Ohio St. 3d at 88. In adopting the Ohio discovery rule, the *O'Stricker* Court stressed that the issue of lost proof in that products liability case was less of a concern because the case rested on defendant's documents and "documentary evidence, unlike the exercise of individuals' memories, does not typically become less reliable over time." *Id.* Here, in contrast to *O'Stricker*, the heart of Schmitz's claims against Notre Dame are that ***people***—many of whom are deceased and, if alive, are forty-years older—committed wrongful acts when they allegedly coached players to lead with their heads, ignored players' injuries, forced injured players back on to the field, and failed to provide proper medical treatment. (*See* Compl. at ¶¶ 62-67.) This case, unlike *O'Stricker*, ***will*** turn on ancient memories of former players, coaches, and staff looking back nearly two generations as to what happened on bygone practice fields, and what experiences Schmitz had specifically.[9] *United States v. Kubrick*, 444

[9] Mr. Schmitz passed away on February 13, 2015. His estate cremated his body without an autopsy. *See* Notice of Suggestion of Death, Ex. 1 (Feb 20, 2015). Even before his passing,

U.S. 111, 117 (1979) (statutes of limitations "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise."); *see also Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 549-50 (6th Cir. 2000) (dismissing claims, noting "the [events] occurred more than fifty years prior to the filing of this lawsuit. Darby, the only researcher still alive, is allegedly in poor health and would be unable to testify. . . . It would also be difficult, if not impossible, for a jury to fully understand the scientific and ethical context in which these [events] took place.").

What's more, on January 17, 2013, Schmitz filed an action against the National Football League to recover for the same conditions Appellants now allege were caused by Notre Dame and co-defendant NCAA. *Schmitz v. The National Football League*, No. 150418/2013, Summons and Verified Complaint (Sup. Ct. N.Y. Cnty. Jan. 17, 2013). Schmitz's allegations in the National Football League suit that his helmet contact in the NFL was "far more intense and violent" than experienced at Notre Dame underscores the importance of applying statutes of limitations in cases centering on decades-old conduct. As the *Kubrick* and *Hughes* courts noted, the long passage of time in the face of Schmitz's own contradictory allegations makes the "search for truth . . . seriously impaired by the loss of evidence" and "fading memories," and makes it impossible for any jury to sort out the "context in which these [events] took place." *Kubrick*, 444 U.S. at 117; *Hughes*, 215 F.3d at 550. The statute of limitations exists to avoid exactly this result. Thus, Ohio Revised Code § 2305.10(A) should be strictly enforced, and this

(continued…)

there was substantial reason to believe he would not have been able to meaningfully participate in this litigation. His now total absence from this case only heightens Notre Dame's fairness concerns.

Court should decline Appellants' invitation to extend the application of the discovery rule to toll their claims.

For all these reasons, the decision to grant Notre Dame's motion to dismiss Appellants' claims as time-barred was proper, and should be affirmed.

(d) Dismissal was also proper because the discovery rule did not toll Appellants' claims where they failed to exercise reasonable diligence and avail themselves of widely available information that should have put them on notice of their claims no later than April 2010.

Even if the discovery rule applied—and it does not—it was proper to dismiss the Complaint because it facially alleged that information was publicly available for years after Schmitz graduated from Notre Dame that put Appellants on notice of their claims. When the discovery rule does apply, plaintiffs are still required to act with reasonable diligence to pursue their claims. *O'Stricker*, 4 Ohio St. 3d at 90 (statute begins to accrue on the date when plaintiff "by the exercise of reasonable diligence . . . should have become aware" of his claims). The discovery rule does not toll claims where a plaintiff fails to avail himself of widely available information that would otherwise put a reasonable person on notice of his claims. *See Faheem v. GlaxoSmithKline*, LLC, No. 07-MD-01871, 2012 U.S. Dist. LEXIS 111272, *16-17 (E.D Pa. Aug. 7, 2012) (considering the amount of information available to the public, plaintiffs failed to exercise reasonable diligence to link their injuries to a product even if defendant pharmaceutical company actively concealed some information about the drug's risks); *Sayler v. Riverside United Methodist Hosp.*, 10th Dist. Franklin No. 01-AP-1196, 2002-Ohio-3068, ¶¶ 4-5, 19 (medical malpractice claim accrued twenty years prior to filing of action where plaintiff knew of his injury, knew who caused it, and had read published reports of other patients at the same hospital suffering the same injury and filing lawsuits); *Plumlee v. Pfizer, Inc.*, No. 13-cv-00414, 2014 U.S. Dist. LEXIS 121634, *21-22 (N.D. Cal. Aug. 29, 2014) (citation omitted) ("[P]laintiffs are

charged with presumptive knowledge of an injury if they have information of circumstances to put [them] *on inquiry* or if they have the *opportunity to obtain knowledge* from sources open to [their] supervision.") (emphasis in original); *In re Zyprexa Prods. Liab. Litig.*, 549 F. Supp. 2d 496, 533-534 (E.D.N.Y. 2008) ("Notice to the market that inquiry is needed can be based on a wide variety of public documents and other sources. . . . Even a single news article can provide sufficiently strong omens to place a plaintiff on notice of the need for investigation.").

Plaintiffs in *Faheem* were prescribed and used an allegedly defective medication designed and manufactured by the defendant. 2012 U.S. Dist. LEXIS 111272, at *3-4. They first used the drug in 1999 and 2001 respectively, and each subsequently suffered a heart attack, with the last injury occurring in 2004. *Id.* However, they did not file their actions until 2011. *Id.* Defendant argued that in 2007 there was sufficient, publicly available information linking the use of its product to adverse cardiovascular events and that not only these plaintiffs—but all users of the drug—were on notice of the link such that discovery tolling ended and all plaintiffs' claims accrued. *Id.*[10] The court agreed with the defendant and held that the plaintiffs' claims accrued no later than the end of 2007. *Id.* at *16-17, 19-20.

The *Faheem* Court noted that in May 2007 a single, peer reviewed study was published in the New England Journal of Medicine linking the drug to cardiovascular events, the product labeling was revised in July 2007, and, around the same time in 2007, media outlets reported about the study and the label change. *Id.* at *12-15. Appellants argued that, despite this publicly available information, defendant had concealed the true extent of the product's risks until 2010. *Id.* at *17. The court, however, rejected tolling because even if the defendant "should have

[10] Plaintiffs' claims were governed by the laws of Tennessee and Kentucky, both of which have discovery rules similar to Ohio's. *Id.* at *8-11.

disclosed more information or disclosed it sooner [that] *does not affect what information became available* in 2007." *Id.* (emphasis added). Plaintiffs' knowledge of their own injuries, of their own history using the product, as well as the information that was publicly available to them in 2007 was sufficient under the laws of their respective states to put them on notice of their claims, and their 2011 actions were time-barred. *Id.* at *19-20. This case calls for the same result because, as alleged, Schmitz knew of his injury, knew of Notre Dame's alleged conduct, and spent the bulk of the Complaint delineating what he claimed was a vast amount of information detailing the link between football, concussions, and long term cognitive disability and disease, which Schmitz claimed was publicly available for ***decades before*** Appellants filed this action.

The Complaint further alleged that there were numerous publications released after Schmitz left Notre Dame—but still decades before the Complaint was filed—that drew the purported link between repeated concussive and sub-concussive hits to football players and long-term neurocognitive effects. (*See e.g.*, Compl. at ¶¶ 88-101.) For example, Appellants identify a University of Virginia study from 1982 which they assert "showed that football players who suffered MTBI suffered pathological short-term and long-term damage." (Compl. at ¶ 89.) Similarly, Appellants maintain that "survey-based papers" published by the University of North Carolina's Center for the Study of Retired Athletes between 2005 and 2007 "found a strong correlation between depression, dementia, and other cognitive impairment in professional football players and the number of concussions those players received." (Compl. at ¶ 96.)

Appellants refer to these and other like materials in the Complaint as "a substantial body of medical and scientific evidence," "mounting literature and medical advice," and "published medical literature." (Compl. at ¶¶ 4-5, 69.) Appellants did not plead, however, that these sources were unavailable to them, or that they could not be discovered through reasonable

diligence. Rather, they merely pled that these sources were not "readily available" to them, a distinction that is both vague and meaningless. (Compl. at ¶ 125.)

Appellants cannot escape *O'Stricker's* reasonable diligence requirement merely by alleging that Notre Dame owed a duty to inform them of these publicly available sources.[11] Irrespective of any alleged duty to disclose publicly available information, Appellants were obligated to exercise reasonable diligence and seek out information that was—or through the exercise of such diligence could be—available to them. *See Faheem*, 2012 U.S. Dist. LEXIS 111272, at *16-17; *see also Hughes*, 215 F.3d at 548 (finding personal injury claim time-barred, noting "publicity was sufficient to charge [plaintiff] with constructive knowledge of the events underlying her cause of action").

Taking Schmitz's allegations all-together: (1) there was publicly available information linking football to MTBI and long-term neurocognitive disease available to Appellants in the decades since Schmitz left Notre Dame (from 1982 to 2010), and more than two-years before the Complaint was filed (Compl. at ¶¶ 69-101); (2) Schmitz knew since at least 1978 of his own injuries (Compl. at ¶¶ 43, 62, 64); and (3) Schmitz knew since 1978—based on his first hand experience—of the allegedly wrongful conduct of Notre Dame, but continued to participate in football due to the "risk" of losing his scholarship. (Compl. at ¶¶ 61-67.)

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[11] Schmitz's allegations of fraudulent concealment (Count II) cannot save his claim, first, because Schmitz knew of his injury and knew of Notre Dame's allegedly wrongful conduct forty years ago. *Braxton*, 2003-Ohio-2872 at ¶ 14; *see also Sayler*, 2002-Ohio-3068 at ¶ 19 ("[P]laintiff possessed the critical facts: he knew he had been hurt and knew who had inflicted the injury as early as 1976."). Second, as in *Faheem*, even if Schmitz's allegations with respect to concealment are taken as true they still cannot toll the statute where information was publicly available that should reasonably have put him on notice of his claims *more* than four years—and as many as forty years—ago. 2012 U.S. Dist. LEXIS 111272 at *17. Third, any concealment Schmitz alleges in his Complaint ended more than two decades ago, and thus cannot toll his claims into the present day. (Compl. at ¶¶ 134-141.)

All these alleged facts more than satisfy the two prongs of the test for claim accrual under *O'Stricker*, and establish that Appellants had—or should have had—knowledge of their claims for decades. *See O'Stricker*, 4 Ohio St. 3d at 90; *see also Faheem*, 2012 U.S. Dist. LEXIS 111272, at *19-20; *see also Hughes*, 215 F.3d at 549-50 (6th Cir. 2000) (plaintiff's claim that she was tortiously compelled to participate in injurious experiment as a child in 1945 was time-barred due to publicly available information, noting also that plaintiff's allegation that she was "forced" to participate was sufficient to have triggered her duty to investigate her claim decades earlier). In light of these facts, Appellants' pleas of ignorance until December 2012 when they allege Schmitz was diagnosed with CTE is unavailing, as the diagnosis goes merely to the extent of his injuries not their existence. (Compl. at ¶ 20); *see also Pingue*, 2004-Ohio-4173, ¶ 14.

Indeed, the last possible trigger date for Appellants' claims is April 2010, when Appellants allege that "NCAA made changes to its concussion treatment protocols" but that "[t]he policy was too late for Steve Schmitz." (Compl. at ¶¶ 109, 113.) As alleged, Appellants should have known through the widely publicized literature and implementation of the NCAA's Concussion Management Plan that Schmitz's concussions and similar symptoms might be linked to long-term cognitive decline, and that the coaching techniques and treatment protocols he alleged he was subjected to while at Notre Dame were not compliant with the state-of-the-art protocols as set forth in the 2010 rules. (Compl. at ¶¶ 109-113.) Thus, once more, Appellants knew—or through the exercise of reasonable diligence should have known—of Schmitz's injury and Notre Dame's alleged wrongful conduct at least four years before they filed this action. *See O'Stricker*, 4 Ohio St. 3d at 90.

In sum, roughly forty years ago, and in no event less than four years ago, Appellants became aware of the facts of Schmitz's injury and of the allegedly wrongful conduct that gives

rise to his claims. Therefore, Schmitz's claims under Counts I, II, III and VI of the Complaint were filed more than two years after they accrued, and they are barred under Ohio Revised Code § 2305.10(A). Further, because Count VII, Appellant Yvette Schmitz's claim for loss of consortium, is derivative of those primary claims it too must fail. *See Breno*, 2003-Ohio-4051, ¶ 24 (affirming dismissal of loss of consortium claim where the primary claims it derived from were dismissed on statute of limitations grounds).

B. Even If Appellants' Contract Claims Did Not Sound In Tort, They Were Still Barred Under Ohio Revised Code § 2305.06 And Were Properly Dismissed.

As set forth above, Appellants' claim for breach of express contract (Count VI)[12] is simply a claim to recover in tort for personal injuries that is time-barred under Ohio Revised Code § 2305.10(A).[13] However, even if Appellant Schmitz pled a breach of contract claim that is severable from his personal injury claims, such a claim is nonetheless time-barred by Ohio Revised Code § 2305.06 governing contract claims.

Section 2305.06 establishes the limitations period to bring claims for breach of a written contract. Contract claims accrue at the time of the breach, and are not subject to discovery tolling. *Pomeroy v. Schwartz*, 8th Dist. Cuyahoga No. 99638, 2013-Ohio-4920, ¶¶ 27, 39, *appeal not accepted*, 138 Ohio St.3d 1450, 5 N.E.3d 667 (2014). Currently, Ohio Revised Code § 2305.06 provides for an eight-year limitations period, but it was amended prospectively in

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[12] Appellants assert in footnote 8 of their brief that "Notre Dame did not challenge the existence of a contract." Appellants Br. 8. Notre Dame moved to dismiss Count VI on the basis that the claim is time-barred, but that is not a concession that Notre Dame believes there is or was a valid contract that supports Appellants' claims.

[13] Appellants do not appear to dispute that their breach of express contract claim (Count VI) is truly a claim for personal injury governed by Ohio's two-year personal injury statute of limitations, O.R.C. § 2305.10. *See* Appellants' Br. at 22; *see also Breno*, 2003-Ohio-4051, ¶¶ 10-12 ("This court has previously held that in determining which statute of limitations should be applied to a particular cause of action courts must look to the actual nature or subject matter of the case rather than the form in which the action is pleaded.") (internal quotation omitted).

2012, therefore, claims for breach of contract accruing prior to 2012 are subject to the prior limitations period of fifteen years. *See Cook v. ProBuild Holdings, Inc.*, 2014-Ohio-3518, 17 N.E.3d 1210, ¶ 16, fn. 2 (10th Dist.).

Here, Schmitz alleged that he was a scholarship athlete until 1978. (Compl. at ¶ 1.) Thus the last possible date on which a breach of his "scholarship contract" could occur was December 31, 1978. (*See* Compl. at ¶¶ 1, 16-19.) Applying the fifteen-year period under the then operative version of Ohio Revised Code § 2305.06, Schmitz's claims for breach of express contract expired on December 31, 1993. Thus, any claim Schmitz might have had for a breach of express contract, severable from his personal injury claims, expired more than twenty years ago.

Appellants nonetheless argue that this Court should ignore its own precedent in *Pomeroy*, and be the first court in Ohio to apply the discovery rule to a contract claim. *See* 2013-Ohio-4920 at ¶ 39. As this Court ably articulated, and as Plaintiffs concede, no Ohio Court has ever adopted or applied the discovery rule to a pure breach of contract claim. *Id.* at ¶ 39 (under the section heading "Discovery Rule Not Applicable to Breach of Contract Claims" citing Ohio authorities declining to apply the discovery rule to breach of contract claims); *see also Cristino v. Admr.*, 10th Dist. Franklin No. 12-AP-60, 2012-Ohio-4420, ¶ 41 (finding no Ohio authorities applying discovery rule to breach of contract claims, and declining to be first to apply it); *Settles v. Overpeck Trucking Co.*, 12th Dist. Butler No. CA93-05-083, 1993 Ohio App. Lexis 6217, *2-3 (Dec. 27, 1993) (same).

Even if there is a basis to accept Appellants' argument that some court somewhere in Ohio will someday adopt the discovery rule in a breach of contract case, this is not that case. To the extent Appellants pled a pure contract claim, they allege that Notre Dame was required under the purported contract to "furnish a safe environment for Steve Schmitz and all of the program's

participants." (Compl. at ¶ 174.) Schmitz affirmatively pled that, contrary to Notre Dame's alleged contractual promise, Notre Dame coaches "taught and/or encouraged . . . [players to use] their helmeted heads as a weapon and/or implement that would injure opponents and themselves." (Compl. at ¶ 62.) Thus, Schmitz was aware at the time he played football of the alleged breach: the failure to make a safe environment for players. *See Pomeroy*, 2013-Ohio-4920, ¶ 40 (no basis to consider application of discovery rule to contract claim where plaintiff who brought breach of contract claim alleging he was owed reimbursements under contract with defendant knew, or should have known, of breach when his demand for reimbursement was denied).

Appellants conflate the issue of when Schmitz had knowledge of the breach he pled—a failure to furnish a safe playing environment—with when he learned about the extent of his head injuries. App. Br. at 22 (arguing that the discovery rule should apply until Schmitz learned of his CTE). If Appellants' claim is one sounding purely in contract, their claim does not require that Schmitz have suffered physical injuries at all to recover, only that he was exposed to unsafe playing conditions. Thus, the breach should have been apparent to Schmitz no later than December 31, 1978, and, under the applicable fifteen-year statute of limitations, any claim by Appellants' sounding purely in contract was barred after December 31, 1993.

For this additional reason, it was proper to dismiss Count VI with prejudice.

VII. CONCLUSION

For the foregoing reasons, Notre Dame respectfully requests that this Court affirm the trial court's dismissal with prejudice of all of Appellants' claims against it—Counts I, II, III, VI and VII of the Complaint.

Date: January 29, 2016

Respectfully submitted,

s/ Matthew A. Kairis

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Counsel for Defendant-Appellee
University of Notre Dame

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of January, 2016, a true copy of the foregoing was electronically filed with the Clerk of Court using the E-Filing system, which will send notification of such filing to all counsel of record at the addresses they have provided to the Court.

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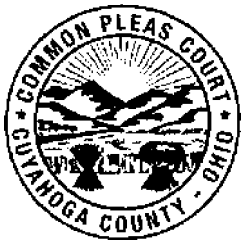
National Collegiate Athletic Association

/s/ Aaron M. Healey
One of the Attorneys for Defendant-Appellee
University of Notre Dame

Exhibit 1



KELLEY A. SWEENEY
CUYAHOGA COUNTY CLERK OF COURTS
1200 Ontario Street
Cleveland, Ohio 44113

Court of Common Pleas

SUGGESTION OF DEATH Electronically Filed:
February 20, 2015 16:28

By: ROBERT E. DEROSE 0055214

Confirmation Nbr. 365693

STEVEN SCHMITZ ET AL

CV 14 834486

vrs.

Judge:

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, ET AL

DEENA R. CALABRESE

Pages Filed: 6

IN THE COURT OF COMMON PLEAS CUYAHOGA COUNTY, OHIO

STEVEN SCHMITZ and YVETTE SCHMITZ,	:	
Plaintiffs,	:	Case No. CV 14 834436
v.	:	Hon. Deena R. Calabrese Magistrate Judge Monica Klein
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, AND UNIVERSITY OF NOTRE DAME,	:	
Defendants.	:	

NOTICE OF SUGGESTION OF DEATH

Now comes Plaintiff YVETTE SCHMITZ, pursuant to Ohio Civ. R. 25(E), to give Notice to this Court concerning the death of Plaintiff STEVEN SCHMITZ.

Plaintiff STEVEN SCHMITZ died February 13, 2015. A copy of his death certificate is attached as Exhibit A to this Notice.

Plaintiffs' counsel received actual knowledge of the death of STEVEN SCHMITZ on February 13, 2015.

Dated: February 20, 2015

Respectfully Submitted,

BARKAN MEIZLISH HANDELMAN GOODIN DEROSE WENTZ, LLP

/s/ Robert E. DeRose
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ATTORNEYS FOR PLAINTIFFS STEVEN AND YVETTE SCHMITZ

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was filed electronically on February 20, 2015 using Cuyahoga County Court of Common Pleas E-Filing filing system, which will send a notice of electronic filing to all parties of record through the Court's system, , and served via regular mail on the following parties:

Matthew A. Kairis
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Steven A. Friedman
Frederick R. Nance
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Cleveland, Ohio 44114

Respectfully submitted,

/s/ Robert E. DeRose
Robert E. DeRose

Attorney for Plaintiffs

EXHIBIT A

928339

2015015778

DECEDENT

REDACTED	(Years) 59	Months	Days	Hours	Minutes	REDACTED	CLEVELAND, OHIO

8a. Residence State	8b. County	8c. City or Town		
OHIO	CUYAHOGA	WESTLAKE		
8d. Street and Number		**8e. Apt. No.**	**8f. Zipcode**	**8g. Inside City Limits?**
27517 Remington Circle			44145	Yes

9. Ever in US Armed Forces?	10. Marital Status at Time of Death	11. Surviving Spouse's Name (if wife, give name prior to first marriage)
No	Married	YVETTE BAILEY

12. Decedent's Education	13. Decedent of Hispanic Origin	14. Decedent's Race
BACHELORS DEGREE (E.G., BA, AB, BS)	No	White

15. Father's Name	16. Mother's Name (prior to first marriage)
GEORGE SCHMITZ	KATHRINE HRONIS

17a. Informant's Name	17b. Relationship to Decedent	17c. Mailing Address (Street and Number, City, State, Zip Code)
YVETTE SCHMITZ	Wife	27517 Remington Circle WESTLAKE, OHIO 44145

18a. Place of Death	
Decedent's Home	

18b. Facility Name (If not Institution, give street & number)	18c. City or Town, State and Zip Code	18d. County of Death
27517 Remington Circle	WESTLAKE, OH 44145	CUYAHOGA

DISPOSITION

19. Signature of Funeral Service Licensee or Other Agent	20. License Number (of licensee)	21. Name and Complete Address of Funeral Facility
	009240	ZEIS-MCGREEVEY FUNERAL HOME INC 16105 DETROIT AVE LAKEWOOD, OH 44107

22a. Method of Disposition	22b. Date of Disposition
Cremation	2-17-2015

22c. Place of Disposition (Name of Cemetery, Crematory, or other place)	22d. Location (City/Town and State)
Westshore Cremation	WESTLAKE, OH

REGISTRAR

23. Registrar's Signature	24. Date Filed
Morry A. Blech	FEB 17 2015

25a. Name of Person Issuing Burial Permit	25b. District No.	25c. Date Burial Permit Issued
BLECH, MORRY	1800	FEB 17 2015

CERTIFIER

25b. Certifier (Check only one)

- [X] Certifying Physician — To the best of my knowledge, death occurred at the time, date, and place; and due to the cause(s) and manner stated.
- [ ] Coroner — On the basis of examination and/or investigation, in my opinion, death occurred at the time, date, and place; and due to the cause(s) and manner stated.

26b. Time of Death	26c. Date Pronounced Dead (Mo/Day/Year)	26d. Was case referred to coroner?
4:45 PM	2/13/2015	No

26e. Signature and Title of Certifier	26f. License number	26g. Date Signed
MD	35.124060	2/16/2015

27. Name (Last, First, Middle) and Address of Person who Completed Cause of Death
HOEKSEMA, LAURA J, 9500 EUCLID AVENUE CLEVELAND, OH 44195

CAUSE OF DEATH

28. Part I. Enter the disease, injuries, or complications that caused the death. Do not enter the mode of dying, such as cardiac or respiratory arrest, shock, or heart failure. List only one cause on each line. Type or print in permanent blue or black ink.

		Approximate Interval Between Onset and Death
Immediate Cause (Final disease or condition resulting in death)	a. Alzheimer's dementia	years
Sequentially list conditions, if any, leading to immediate cause.	b. Due to (or as Consequence of)	
Enter Underlying Cause (Disease or injury that initiated events resulting in death)	c. Due to (or as Consequence of)	
	d. Due to (or as Consequence of)	

Part II. Other significant conditions contributing to death but not resulting in the underlying cause given in Part I: Coronary artery disease, cerebrovascular disease

29a. Was An Autopsy Performed?	29b. Were Autopsy Findings Available Prior To Completion Of Cause of Death?
[ ] Yes [X] No	[ ] Yes [ ] No [ ] Not Applicable

30. Did Tobacco Use Contribute to Death?	31. If Female, Pregnancy Status	32. Manner of Death
[ ] Yes [ ] Unknown [X] No [ ] Probably	[ ] Not pregnant within past year [ ] Pregnant at time of death [ ] Not pregnant, but pregnant within 42 days of death [ ] Not pregnant, but pregnant 43 days to 1 year before death [ ] Unknown if pregnant within the past year	[X] Natural [ ] Homicide [ ] Accident [ ] Pending Investigation [ ] Suicide [ ] Could not be determined

33a. Date of Injury (Mo/Day/Year)	33b. Time of Injury	33c. Place of Injury (e.g., Decedent's home, construction site, restaurant, wooded area)	33d. Injury at Work?
			[ ] Yes [ ] No

33e. Location of Injury (Street and Number or Rural Route Number, City or Town, State)

33f. Describe How Injury Occurred:	33g. If Transportation Injury, Specify:
	[ ] Driver/Operator [ ] Pedestrian [ ] Passenger [ ] Other:

REA 2724 Rev. 01/07

STEVEN I SCHMITZ

Place of Death: Decedent's Home	Date of Death: February 13, 2015
23. Registrar's Signature: Mary A. Bleck	24. Date Filed: FEB 18 2015

25a. Certifier (Check only one)

☒ Certifying Physician
To the best of my knowledge, death occurred at the time, date, and place, and due to the cause(s) and manner stated

☐ Coroner
On the basis of examination and/or investigation, in my opinion, death occurred at the time, date, and place, and due to the cause(s) and manner stated

25b. Time of Death	25c. Date Pronounced Dead (Mo/Day/Year)	25d. Was Case referred to Coroner?
4:45 PM	2/13/2015	

25e. Signature and Title of Certifier	25f. License number	25g. Date Signed
MD	35.124060	2/17/2015

27. Name (First, Middle, Last) and Address of Person who Completed Cause of Death
HOCKSEMA, LAURA J, 9500 Euclid Avenue Cleveland, OH 44195

28. Part I. Enter the disease, injuries, or complications that caused the death. Do not enter the mode of dying, such as cardiac or respiratory arrest, shock, or heart failure. List only one cause on each line. Type or print in permanent black ink.

		Approximate Interval Between Onset and Death
Immediate Cause (Final disease or condition resulting in death)	a. Chronic traumatic encephalopathy	years 5
Sequentially list conditions, if any, leading to the immediate cause. Enter Underlying Cause Last (Disease or injury that initiated events resulting in death)	b. Due to (or as Consequence of)	
	c. Due to (or as Consequence of)	
	d. Due to (or as Consequence of)	

Part II. Other Significant Conditions contributing to death but not resulting in the underlying cause given in Part I

29a. Was an Autopsy Performed? ☐ Yes ☒ No

29b. Were Autopsy Findings Available Prior to completion of Cause of Death? ☐ Yes ☐ No ☐ Not Applicable

30. Did Tobacco Use Contribute to Death? ☐ Yes ☐ Unknown ☒ No ☐ Probably

31. If Female, Pregnancy Status
☐ Not pregnant within past year
☐ Pregnant at time of death
☐ Not pregnant, but pregnant within 42 days of death
☐ Not pregnant, but pregnant 43 days to 1 year before death
☐ Unknown if pregnant within the past year

32. Manner of Death
☒ Natural ☐ Homicide
☐ Accident ☐ Pending Investigation
☐ Suicide ☐ Could not be determined

33a. Date of Injury (Mo/Day/Year)	33b. Time of Injury	33c. Place of Injury (e.g., Decedent's Home, Construction Site, Restaurant, Wooded Area)	33d. Injury at Work?
			☐ Yes ☐ No

33e. Location of Injury (Street and Number or Rural Route Number, City or Town, State)

33f. Describe How Injury Occurred:

33g. If Transportation Injury, Specify: ☐ Driver/Operator ☐ Pedestrian ☐ Passenger ☐ Other:

HEA 2752
Rev. 01/07

THIS SUPPLEMENTARY CERTIFICATE IS TO BE COMPLETED BY THE ATTENDING PHYSICIAN OR CORONER AND FILED WITH LOCAL REGISTRAR OF VITAL STATISTICS
Required by section 3705.27 of the Ohio Revised Code

928339

2015015778